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IN THE

Supreme Court of the United States

October Term, 1972
No. 72-10

DAVID MOOR, *et al.*,

Petitioners,

vs.

COUNTY OF ALAMEDA, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

PETITION FOR REHEARING.

The Rundles, for themselves only, respectfully pray the Court to grant their petition for rehearing.[1]

[1]The petitioners originally were David Moor, William Donovan Rundle, Jr., a minor, by William D. Rundle, his guardian *ad litem*, William D. Rundle and Sarah Rundle. David Moor and the Rundles each filed separate suits in the District Court (see Appendix at 5 and 22). Because the issues raised on appeal to the court below in each case were identical, except that the Moor case involved the additional issue of diversity jurisdiction, the court below ordered the appeals consolidated. (See Appendix C to Petition for Certiorari, at 14.) As a result of the Court's opinion dated May 14, 1973, David Moor prevailed on the diversity jurisdiction issue, thus rendering the other jurisdictional issues moot as to him. However, because the Rundles cannot claim diversity jurisdiction, and because they did not prevail on their Civil Rights Acts jurisdiction claim, they alone are now seeking a rehearing on the pendent jurisdiction portion of their case.

I.

The Court's Decision Not to Rule on the Issue of Whether Judicial Power Exists to Join a Pendent Party Stems Entirely From a Mistake of Fact in That the District Court Never Decided, as a Matter of Discretion, Not to Hear the State Law Claims Against the County, but Rather Predicated Its Decision Solely Upon a Lack of Judicial Power.

The sole basis for the Court's decision not to rule on the issue of whether judicial power exists to hear pendent claims involving pendent parties was its assumption that the District Court, "in exercise of its legitimate discretion, properly declined to join the claims against the County in these suits." (Slip Opinion No. 72-10, at 22.) Yet, any fair reading of the District Court's decision on this issue (Appendix F to Petition for Certiorari, at 21) refutes that hypothesis and compels the conclusion that the District Court refused to hear the pendent state law claims against the County solely because it believed that it lacked the judicial power to exercise any discretion in view of *Hymer v. Chai*, 407 F.2d 136 (9th Cir. 1969). Indeed, there is nothing in the District Court's decision on pendent jurisdiction which can even remotely be said to evidence that that decision results from an exercise of discretion.

At the time the pendent jurisdiction issue was raised in the District Court, the focus of the parties was on the question of judicial power. (Appendix F to Petition for Certiorari, at 22.) In ruling against the petitioners, the District Court stated:

> "While plaintiff has skillfully briefed many interesting arguments, the court concludes that *at least within the Ninth Circuit*, the defendant County is correct that *pendent jurisdiction is not*

available in the circumstances of this case. Accordingly, the court does not reach plaintiff's other contentions.

"The *controlling point* is that in the Ninth Circuit pendent jurisdiction is available only to join claims, not to join parties. *Hymer v. Chai,* 407 F. 2d 136 (1969). That is, the concept applies 'only where the same parties are involved on the state and federal claims.' Wright, *Federal Courts* (2nd Ed. 1970), at 65. *Since there is no federal claim alleged against the County, no state claim against the County is within the pendent jurisdiction of this court, no matter how closely related factually that state claim may be to a federal claim against another defendant.* On this view of the doctrine—viz. that *the doctrine is simply not available—this court is devoid of the power to adjudicate the state claim against the County; the issue is not one of discretion.* See *United Mine Workers v. Gibbs,* 383 U.S. 715, 725-26 (1966)." *Id.* at 22-23. (Emphasis added.)

The District Court, thus, could not have made any clearer the fact that its decision was based entirely upon a lack of judicial power. The District Court stated unequivocally that within the Ninth Circuit "pendent jurisdiction is not available in the circumstances of this case" and that the doctrine is available "only to join claims, not to join parties." Moreover, the District Court stated that "no matter how closely related factually [a] state claim may be to a federal claim" to the extent that the pendent state law claim involves the potential joinder of a pendent party, "this court is devoid of the power to adjudicate the state claim against the County; *the issue is not one of discretion.*"

The District Court went on to analyze *Hymer* and the fact that other courts of appeals have reached an opposite result on the question of judicial power. But, the District Court concluded:

> "The short and *authoritative* answer to plaintiff's latter contention is that whether or not the Ninth Circuit's position in *Hymer v. Chai* represents a dying view, that position was firmly stated *and is binding on this court.*" *Id.* at 24. (Emphasis added.)

To further evidence that the District Court's decision is predicated solely upon a lack of judicial power are the following statements from its decision:

> "The basic inquiry in this regard is whether the doctrine may be employed to allow the joinder of any party who could not otherwise be in a federal court. And on this point, *Hymer v. Chai* speaks quite directly: 'Joinder of claims, not joinder of parties, is the object of the doctrine.' 407 F.2d at 137.
>
> ". . . Thus, since the court in *Hymer* did not allow the doctrine of pendent jurisdiction to operate where its effect would have been to join an additional plaintiff, *Hymer v. Chai* counsels strongly against employing the doctrine where an additional defendant would be joined." *Id.* at 25.

Again, after further analyzing *Hymer*, the District Court concludes by stating:

> "What this analysis demonstrates is this: In *Hymer v. Chai*, the Ninth Circuit was presented with the most favorable of circumstances in which to apply pendent jurisdiction to join an additional party; the claims were state claims; they were

closely related; the 'pendent party' would be a plaintiff. Nonetheless, the court refused to apply the doctrine. In light of that decision, this court is *unable* to permit the application of the doctrine to the present case." *Id.* at 27. (Emphasis added.)

The use of the term "unable" is obviously not consistent with any discretionary analysis and again evidences that the District Court's decision is based solely upon a lack of judicial power.

Where then did the Court secure the notion that the District Court decided, as a matter of discretion, that the County could not be joined as a party defendant on the pendent state law claims? From the Court's opinion it seems that that notion derived entirely from footnote 5 of the District Court's decision. (Slip Opinion No. 72-10, at 22 ns. 34 and 35.) Yet, any fair reading of footnote 5 shows that the District Court was not basing its decision upon an exercise of discretion. Footnote 5 states:

> "*Without expressing any opinion on the following* (emphasis added), the court notes that even were it free of the influence of *Hymer v. Chai*, serious obstacles to the application of the doctrine would still present themselves. First, on the issue of the *power* to adjudicate the claim, the court would still be confronted with the reluctance of other federal courts to permit a pendent party defendant in a federal question case. See *Wojtas v. Village of Niles*, *Gautreau v. Central Gulf Steamship Corp.*, and *Tucker v. Shaw*, all *supra* at n. 3.
>
> "Moreover, on the issue of the court's *discretion* to adjudicate the pendent claim, there would still be

substantial doubts as to whether the state claim should be heard. The present action will be tried to a jury, and with the introduction of a claim against the County under the California Tort Claims Act, with the special defenses available to the County, the case could become unduly complicated. Further, this court would be called upon to resolve difficult questions of California law upon which state court decisions are not legion. See *United Mine Workers v. Gibbs*, 383 U.S. 715, 726-27 (1966); Shakman, *The New Pendent Jurisdiction of the Federal Courts*, 20 Stan. L.Rev. 262, 265-66 (1968)." Appendix F to Petition for Certiorari, at 27-28.

Thus, at the outset the District Court prefaces the entire footnote by stating: "Without expressing any opinion on the following, . . ." Nothing more could have been said to keep the footnote from being elevated to the status of an alternative basis of decision.

In addition, the District Court's observation about the reluctance of other federal courts to permit a pendent party defendant in federal question cases is clearly incorrect in view of cases such as *Leather's Best, Inc. v. S.S. Mormaclynx*, 451 F.2d 800 (2d Cir. 1971) and *Connecticut Gen'l Life Ins. Co. v. Craton*, 405 F.2d 41 (5th Cir. 1968). Moreover, subsequent to the District Court's pendent jurisdiction decision *Eidschun v. Pierce*, 335 F.Supp. 603 (S.D. Iowa 1971), was decided. *Eidschun* is substantively identical to the *Rundle* case on the pendent jurisdiction issue. Thus, if the District Court were freed of the constraints of *Hymer* it would certainly review the first portion of its footnote statement on the "reluctance" of other federal courts in view of the above authorities.

As for the second paragraph of footnote 5, which is the District Court's only mention of discretion, it is simply wrong to ignore the District Court's prefatory statement that it was not expressing any opinion on the matter and to conclude that the statements made therein amount to an opinion. Moreover, the very issues which the District Court indicated might exist if the County were joined as a pendent party defendant will now have to be decided in any event by the District Court in the companion case of *Moor v. Madigan, et al.* in view of the Court's opinion on diversity jurisdiction. That fact alone, coupled with the subsequent *Eidschun* decision, could well cause the District Court to decide, as a matter of discretion, to hear the pendent state law claims against the County in the *Rundle* case if it were freed from the constraints of *Hymer*.

In sum, petitioners are not attempting to re-argue or to take issue with any aspect of the Civil Rights Acts jurisdiction claim that was decided on the merits against them. But, because petitioners have been so totally frustrated in their efforts to obtain a decision on the merits of the judicial power portion of their pendent jurisdiction claim,[2] and because the Court's refusal to decide the judicial power question may severely prejudice the petitioners' future efforts to consolidate their case with the *Moor* case for trial,[3] basic considerations of fairness alone dictate that the Court grant the petition for rehearing and decide whether the cases cited in footnote 29

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[2] Petitioners at all times have been aware of the discretionary aspect of the doctrine of pendent jurisdiction and, if they believed for one moment that the District Court's decision was predicated upon a legitimate exercise of discretion, they would not have wasted their time or the Court's in raising the judicial power argument, nor would they now be seeking a rehearing on this issue.

[3] See Part II, *infra*.

(Slip Opinion No. 72-10 at 20) or footnote 30 (*Id.* at 21) of its opinion are correct. Indeed, since the District Court never exercised its discretion, and, if *Hymer* is wrong on judicial power, which it must be if the cases cited in footnote 29 of the Court's opinion are correct, the Court should so hold and remand the *Rundle* case to the District Court so that it might then truly be free to exercise its discretion. For, at a minimum, the Court can have no doubt that the District Court's decision was strongly influenced by *Hymer*, and that in view of subsequent developments the District Court might now decide to keep the County as a defendant. *Cf. Picking v. Pennsylvania R. Co.*, 151 F.2d 240, 252 (3d Cir. 1945), *reh. denied*, 152 F.2d 753 (3d Cir. 1945).

II.

The Court's Decision Not to Rule on the Issue of Whether Judicial Power Exists to Join a Pendent Party May Severely Prejudice the Future Prosecution of This Case and the Companion Moor Case.

In footnote 36 of the Court's opinion (Slip Opinion No. 72-10, at 23), the Court somewhat unfairly dismisses the effect of its decision in the *Moor* case on the *Rundle* case by noting the comment of petitioners' counsel that the two cases were consolidated only for purposes of appeal. It is this counsel's recollection that this discussion occurred in the context of the Court's inquiry as to whether the consolidation of the *Rundle* and *Moor* cases would destroy diversity jurisdiction, and was made in an effort to explain how the cases became consolidated for presentation to the Court. To the ex-

tent that there was any indication that the two cases will be tried separately, such indication was premature as a substantial amount of discovery still remains to be done. Petitioners will not make any final decision on whether to move to have the two cases consolidated for trial until discovery has been completed and the pretrial conference now scheduled for November 2, 1973 is held.

It is important to note, however, that petitioners did make a previous effort to have these cases consolidated for trial at a time when the County had been dismissed from the *Rundle* case, but was still a defendant in the *Moor* case on the basis of diversity jurisdiction. The respondents objected to this consolidation on the ground that the County was a defendant in one case and not in the other. The motion and opposition are attached hereto as Exhibits A and B respectively. The District Court never ruled on the motion as it was withdrawn by petitioners so that the status of the County as a defendant in each of the cases could first be resolved. See Exhibit C attached hereto.

Should petitioners now seek to consolidate the cases for trial for the reasons of judicial economy they previously advanced, they will undoubtedly be met by the same kind of opposition. Thus, if *Hymer* is wrong, then in fairness to petitioners they should at least have the opportunity to request the District Court to exercise its discretion free from the constraints of *Hymer* before they choose to again seek consolidation.

III.

The Court Has Apparently Sanctioned a Conflict Among the Circuits Which Goes to the Heart of Federal Judicial Power, and Which, Until Resolved, Leaves Divergent Jurisdictional Rights Among the Circuits and Induces Forum Shopping.

A review of the cases cited by the Court in footnotes 29 and 30 of its opinion (Slip Opinion No. 72-10, at 20 and 21, respectively) shows not only that an express conflict exists among the courts of appeals as to whether there is judicial power to join a pendent party, but also that the issue has been raised in a wide variety of federal litigation and is continuing to be raised. Because of this conflict, Professor Moore recently stated:

> "Whether doctrine of pendent jurisdiction would permit the bringing in of a different party as to whom no federal claim exists as to which the state claim can be said to be pendent is not altogether clear." 3A J. Moore, Federal Practice ¶18.07 [1.-4] (Supp. 1972, at 31.)

As for the importance of the pendent party issue, the Court seemingly recognized it when it stated:

> "Whether there exists judicial power to hear the state law claims against the County is, in short, a subtle and complex question with far reaching implications." (Slip Opinion No. 72-10, at 22.)

Given, therefore, this express conflict and the recognized importance of the issue, why did the Court apparently sanction a result that furnishes litigants in federal courts with divergent jurisdictional rights dependent sole-

ly upon the circuit in which suit is brought, and which, of necessity, will induce forum shopping? If judicial power to join pendent parties is valid as a proposition of law in the Second, Third, Fourth, Fifth, and Eighth Circuits, surely litigants in the Ninth Circuit are entitled to the same right. Yet, that right to seek to join a pendent party does not presently exist in the Ninth Circuit since the court below expressly reaffirmed *Hymer* (Appendix A to Petition for Certiorari, at 10), and this Court has allowed *Hymer* to stand.

Moreover, the Court's opinion not only fails to clarify the law on pendent parties, but will, of necessity, insure more litigation on the judicial power question since the cases cited in footnotes 29 and 30 of the Court's opinion both cannot be correct. In addition, the Court has left a situation in which another case raising the same judicial power issue will, at some point, have to be brought before it since the express conflict cannot be allowed to remain. Thus, to say that the Court's opinion on pendent parties will raise more questions than it resolves is not, in any sense, hyperbole.

To evidence the significance of this conflict and the necessity to resolve it, the Court's attention is directed to the very recent cases of *Anthony v. Cleveland*, 355 F.Supp. 789 (D. Hawaii 1973), and *Shippers & Receivers Coop. Ass'n, Inc. v. Penn Cent. Tr. Co.*, 355 F.Supp. 949 (E.D. Pa. 1973), both of which were decided after argument in this case.

Anthony arose within the Ninth Circuit. When the plaintiff sought to invoke the doctrine of pendent

jurisdiction to join a pendent party, the district court held, on the basis of *Hymer* and its reaffirmation in this case by the court below,[4] that it was without the power to do so, stating:

> "In his final argument, Plaintiff contends that he can join his breach of contract claim against the University with his § 1983 action against the University officials under the doctrine of pendent jurisdiction. While four circuits have interpreted the Supreme Court's decision in United Mine Workers v. Gibbs, 383 U.S. 715, 86 S.Ct. 1130, 16 L.Ed.2d 218 (1966), to uphold pendent jurisdiction claims even though they include 'extra' non-federal plaintiffs or defendants; the Ninth Circuit has taken a contrary position. In Hymer v. Chai, 407 F.2d 136, 137-138 (9th Cir. 1969), the court rejected any liberalization of the doctrine and held that pendent jurisdiction is available only to join claims, not parties. This decision was reaffirmed in Moor v. Madigan, 458 F.2d 1217, 1220-1221 (9th Cir. 1972), where appellants made the same contention advanced by Plaintiff here. Thus it is well settled that in the Ninth Circuit a § 1983 action against state agency employees will not permit a federal court to join the agency itself as a party solely on the basis of the pendent state claims." 355 F.Supp. at 793.

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[4]There is little likelihood that the Ninth Circuit Court of Appeals will change its position in *Hymer* because of a longstanding rule of the court below that no three-judge panel can overrule another such panel on a similar though not identical issue, *Carson v. United States*, 310 F.2d 558, 561-562 (9th Cir. 1962); *Halprin v. United States*, 295 F.2d 458, 461 (9th Cir. 1961); *Ellis v. Carter*, 291 F.2d 270, 273 n. 3 (9th Cir. 1961); *Upton v. C.I.R.*, 283 F.2d 716, 723 (9th Cir. 1960).

On the other hand, when the same pendent party question arose in the *Shippers & Receivers Coop.* case, which occurred within the Third Circuit, the district court allowed the pendent party joinder. In reaching its decision the court stated:

> "Since the *Gibbs* decision, the issue before this Court—whether the doctrine of pendent jurisdiction would permit the assertion of a related state claim against a separate and independent party against whom no federal claim exists—has not been conclusively resolved. *In fact, this issue has caused a substantial split among the federal appellate courts.* On one hand, the Court of Appeals of the Second, Fourth, Fifth, and Eighth Circuits have held that the broad language of *Gibbs* permits the assertion of federal jurisdiction over additional parties who were not involved in the federal claim and whose sole connection with the case stemmed from the pendent state law claim. The Sixth and Ninth Circuits, on the other hand, have rejected the above approach. *Apparently, in order to resolve the conflict between the Circuits, the Supreme Court granted certiorari to determine the question whether* Gibbs *allows a federal court to exercise jurisdiction over a party on a pendent state law claim when that party is not involved in the related federal claim.* Moor v. Madigan, 458 F.2d 1217 (9th Cir. 1972), cert. granted sub nom. Moor v. Alameda County, 409 U.S. 841, 93 S.Ct. 66, 34 L.Ed.2d 80 (1972). See 41 U.S. L.W. 3090." 355 F.Supp. at 952. (Emphasis added.)

Thus, at least one federal court has now stated that believed, as petitioners herein believed, that certiorari

was granted in this case to resolve the pendent party conflict. Surely, therefore, the timeliness and importance of the issue and the necessity of its resolution cannot be doubted.

In the final analysis the pendent party judicial power issue now presented to the Court far transcends the instant case, and is infinitely more far-reaching than either of the other jurisdictional issues already decided; for this issue goes to the very heart of a federal court's power to control the scope of the case before it. If the petitioners and the host of federal cases cited in footnote 29 of the Court's opinion are correct, then the pendent party concept is the logical consequence of *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966). On the other hand, if the respondents and the cases cited in footnote 30 of the Court's opinion are correct, then the Court should say so. But, irrespective of how the Court chooses to rule, it should rule one way or the other and put an end to the continuing and ever-increasing litigation on the question of what *Gibbs* means in terms of judicial power.

IV.

Conclusion.

This petition for rehearing involves only the pendent jurisdiction issue. It seeks no more than to have an express conflict among decisions of the courts of appeals on federal judicial power resolved and, if resolved in petitioners' favor, a remand to the District Court so that the District Court might then truly exercise its discretion with the knowledge that it possesses the judicial power to do so.

To this end petitioners request that since the issue of judicial power has been briefed and argued, that

the Court modify Part II of its opinion and decide whether there is judicial power to join pendent parties, and if such power exists to remand the case to the District Court rather than speculate on whether the District Court exercised its discretion. Alternatively, if the Court feels that the issue should be further argued, it should set the case down for reargument at the earliest convenient time for the Court.

In making this request, petitioners are not unmindful of the fact that petitions for rehearing are rarely granted. Yet, given the patent inequity that has resulted to them from the Court's totally unsupported conclusion that the District Court's pendent party decision was based on an exercise of discretion, and the fact that an express conflict in decisions going to the very heart of federal judicial power still exists among the courts of appeals, petitioners submit that the pendent party issue would seem to have the requisite public importance to warrant the granting of their petition.

Respectfully submitted,

RONALD M. GREENBERG,
Counsel for Petitioners.

Certificate of Counsel.

I certify that this petition is presented in good faith and not for delay.

RONALD M. GREENBERG

EXHIBIT "A."

Notice of Motion for Consolidation; Points and Authorities and Affidavit of Ronald M. Greenberg in Support Thereof.

United States District Court, Northern District of California.

David Moor, Plaintiff, v. Frank I. Madigan, et al, Defendants. No. C 70-333 RFP.

William Donovan Rundle, Jr., etc., et al, Plaintiffs, v. Frank I. Madigan, et al, Defendants. No. C 70-334 RFP.

TO DEFENDANTS AND TO THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on Friday, May 14, 1971, at 9:30 a.m., or as soon thereafter as the matter can be heard, in the courtroom of the Honorable Robert F. Peckham, United States District Judge, in the United States Courthouse Building, 450 Golden Gate Avenue, San Francisco, California, plaintiffs will move the court, pursuant to Rule 42(a), Fed. R. Civ. P., for an order that the above entitled actions be consolidated on the grounds that they involve common questions of law and fact and that consolidation will avoid unnecessary costs or delay.

Said motion will be based on this notice, the pleadings, records and files herein, the affidavit of Ronald M. Greenberg, and the memorandum of points and authorities attached hereto, and such evidence as may be presented on the hearing of said motion.

DATED: April 22, 1971.

RICHARDS, WATSON & DREYFUSS
By /s/ Ronald M. Greenberg
Ronald M. Greenberg
Attorneys for Plaintiffs

POINTS AND AUTHORITIES

Rule 42(a) of the Federal Rules of Civil Procedure authorizes the court to consolidate separate actions in order to avoid unnecessary expense and delay if they are pending before the court and involve "a common question of law or fact."

In *Cecil v. Missouri Public Service Corp.*, 28 F.Supp. 649 (W.D. Mo. 1939) the court held that four cases should be consolidated under Rule 42(a) where all plaintiffs were injured in the same accident:

> "In these four cases every question of law and fact in each case, except the extent of each plaintiff's injuries, is identical with the questions of law and fact in the three other cases. Certainly they are cases which the rule authorizes the court to consolidate."

In *Tiernan v. Dunn*, 295 F.Supp. 1251, 1252 (D.R.I. 1969), the court consolidated four cases which arose out of an automobile accident in which all of the parties were involved:

> "Certainly, where, as here, there are totally identical facts and legal theories involved in the various actions, consolidation seems appropriate."

It is apparent from the Affidavit of Ronald M. Greenberg, filed herewith, that these two actions involve identical issues of "law or fact."

For these reasons plaintiffs respectfully request that the above captioned matters be consolidated.

DATED: April 22, 1971.

Respectfully submitted,

RICHARDS, WATSON & DREYFUSS

By /s/ Ronald M. Greenberg

Ronald M. Greenberg

Attorneys for Plaintiffs

State of California, County of Los Angeles—ss.

RONALD M. GREENBERG, being first duly sworn, says:

I am associated with the firm of Richards, Watson & Dreyfuss, formerly Richards, Watson & Hemmerling, counsel for plaintiffs herein, and am the attorney primarily responsible for these matters.

On Feburary 12, 1970, I caused both of the above matters to be filed. Thereafter, on February 16, 1970, I filed a Notice of Related Cases. As a result, both matters were transferred in accordance with LR 101(g) of the Assignment Plan to the same judge.

Both cases arise out of a shooting incident that occurred on May 15, 1969, at approximately 3:45 p.m., in the vicinity of Parker and Chilton Way in the City of Berkeley, California. The evidence gathered to date shows that the defendant Lawrence L. Riche fired a shotgun at that time at least once and possibly twice and that the plaintiff David Moor and the plaintiff William Donovan Rundle, Jr., were both hit as a result of that shot or shots.

Because of this fact, the witnesses to the shooting incident in both cases are identical. Moreover, each of these two plaintiffs is a witness in the other's case. In addition, the evidence shows that both plaintiffs were taken from the scene of the shooting at the same time and by the same ambulance.

The defendants in both cases are identical with the possible exception of the defendant County of Alameda. However, since the County's liability is vicarious its presence has no real bearing on the presentation of the cases.

Further evidencing the identity of issues of fact and law in these two matters is the fact that the defendant

Riche was indicted by the United States Government in Case No. 70-87 for shooting the plaintiff William Donovan Rundle, Jr., and others. The only other person shown by the Government during the course of the trial to have been shot in the Rundle incident was the plaintiff David Moor. Both shooting victims testified in that case.

I sincerely believe that failure to consolidate these two actions would be an imposition on the time of the court and the jury. Both actions arose out of the same incident, involve the same legal theories and the same proof, with the sole exception of medical testimony. It appears that trial of these matters will be difficult and time consuming. The above mentioned criminal trial took two and a half weeks. Because of the additional defendants involved herein and the needed medical testimony, I anticipate that these cases will take approximately four to five weeks to try. That time would be doubled if the cases were tried separately. Plaintiffs have only limited financial resources and the expense of prosecuting two separate lawsuits involving, for the most part, the same witnesses would be needlessly burdensome.

Executed at Los Angeles, California, on April 22, 1971.

By /s/ Ronald M. Greenberg
Ronald M. Greenberg

Subscribed and sworn to before me April 22, 1971.

/s/ Laurie A. Wood
Notary Public in and for County of
Los Angeles, State of California

EXHIBIT "B."

Memorandum of Points and Authorities in Opposition to Motion to Consolidate.

In the United States District Court, for the Northern District of California.

William Donovan Rundle, Jr., etc., et al., Plaintiffs, vs. Frank I. Madigan, et al., Defendants. No. C-70-334-RFP.

David Moor, Plaintiff, vs. Frank I. Madigan, et al., Defendants. No. C-70 333-RFP.

Plaintiffs' motion to consolidate the *Moor* and *Rundle* cases should be denied since the factual and legal issues in the two cases are not identical, as plaintiffs allege.

First, if the County of Alameda is retained as a defendant in *Moor*, then entirely separate legal and factual issues are presented in that case. Under state law, alleged violations of Civil Rights are irrelevant—the issues against the County turn on negligence and intentional tort. Factual and legal issues relating to the special defenses applicable to the County would be principal to the case.

Second, the extent of participation in the riot by the two plaintiffs may differ. Plaintiff Rundle had been involved for some time prior to the time he was shot and was directly involved at the time he was shot. Plaintiff Moor was in a different location and there are different operative facts relative to his involvement and shooting.

Even though there are some common questions, consolidation is not necessary where there are other issues in one case that would be collateral to the other. *State*

Mut. Life Assur. Co. of America v. Peat, Marwick, Mitchell & Co., 49 F.R.D. 202 (N.Y. 1969).

Where consolidation would involve different parties and special limitations and defenses are available to only some defendants, consolidation will not be ordered. *Pica v. General Foods Corp.*, 18 F.R.D. 352 (Mass. 1955).

Where consolidation would result in confusion or prejudice it should not be ordered. *May v. Liberty Mut. Ins. Co.*, 35 F.R.D. 234 (Pa. 1964); *American Photocopy Eg. Co. v. Fair*, 35 F.R.D. 236 (Ill. 1963); see *U.S. v. Krauer*, 149 F.2d 519 (7th Cir. 1945), *aff'd* 328 U.S. 654.

Here, consolidation of these cases may result in confusion to the jury and would unduly complicate the trials of these matters. Plaintiffs' motion should be denied.

DATED: May 10, 1971.

Respectfully submitted,

CROSBY, HEAFEY, ROACH & MAY
Professional Corporation
By Peter W. Davis
Attorneys for Defendants

EXHIBIT "C."

Notice of Withdrawal of Motion for Consolidation.

United States District Court, Northern District of California.

David Moor, Plaintiff, v. Frank I. Madigan, et al., Defendants. No. C 70-333 RFP.

William Donovan Rundle, Jr., etc., et al., Plaintiffs, v. Frank I. Madigan, et al., Defendants. No. C 70-334 RFP.

TO DEFENDANTS AND TO THEIR ATTORNEYS OF RECORD:

Plaintiffs in the above captioned matters hereby withdraw their Notice of Motion for Consolidation filed on April 23, 1971 and scheduled for hearing on May 21, 1971.

Dated: May 14, 1971.

RICHARDS, WATSON & DREYFUSS
By Ronald M. Greenberg
Attorneys for Plaintiffs